No. 11390

In the United States Circuit Court of Appeals

For the Ninth Circuit

WILLAMETTE TUG AND BARGE COMPANY, a Corporation,

Appellant,

vs.

OLE ERICKSEN and PACIFIC BUILDING MATERIALS COMPANY, a Corporation, C. T. SMITH and ESSON SMITH, co-partners doing business as C. T. Smith and Son, Claimants of the Tug "CHARLES T", Steamship "KARL LIEBKNECHT",

Appellees.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the District Court of the United States for the District of Oregon.

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JURISDICTION

This was a libel in admiralty in the District Court of the United States for the District of Oregon. The appeal is from the decree there entered against the appellant; consequently the jurisdiction of this Court is clear.

STATEMENT

The Willamette Tug and Barge Company, the appellant in this cause, is a corporation and engaged, among other things, in the business of towing barges and ships on the Willamette and Columbia Rivers. Willamette Tug and Barge Company, appellant, owned five tugs, and in addition, according to the testimony of Arthur A. Riedel (R. 97) gave out a lot of towing to other boats. C. T. Smith & Son were the owners of a small diesel tug named the "CHARLES T". They had their place of business in Stevenson, Washington, located on the Columbia River some fifty (50) miles by water from Portland, Oregon. Prior to the month of April, 1944, Arthur A. Riedel as president and manager of the Willamette Tug & Barge Company and Esson Smith had a telephone conversation relative to the matter of using the Tug "CHARLES T". Esson H. Smith contends that his telephone conversation was in regard to a charter of the boat. (R. 86). Arthur A. Riedel of the Willamette Tug & Barge Company testified that Smith communicated with him regarding the matter of towage. (R. 97). Thereafter, as a result of a telephone conversation and a personal visit, the Tug "CHARLES T" was moved from Stevenson, Washington, to Portland, Oregon; and for the months of April, May and part of the month of June, 1944, the Tug "CHARLES T" was engaged in towing on the Willamette and Columbia Rivers.

On June 22, 1944, the Tug "CHARLES T" was engaged in towing three empty barges from Portland to Longview, Washington. One of the barges was the

EK-9. At a point in the Columbia River a collision occurred between the Russian steamship KARL LIEBKNECHT and the Barge EK-9, which was being towed by the Tug "CHARLES T". Later, on June 9, 1944, a libel was filed in the United States District Court for the District of Oregon against the diesel tug "CHARLES T", the libel being in rem, and filed by Ole Erickson and others. Later on C. T. Smith and Esson Smith as owners of the tug "CHARLES T" filed a petition to bring in the Willamette Tug & Barge Company, an Oregon corporation, under Rule 56 Admiralty Laws of Practice, and an order was made impleading the Willamette Tug & Barge Company. In the petition of C. T. Smith and Esson Smith it was alleged that C. T. Smith and Esson Smith entered into an oral contract with the Willamette Tug & Barge Company whereby for and in consideration of an agreed rental to be paid by the Willamette Tug & Barge Company that the said C. T. Smith and Son did charter, transfer and deliver to the Willamette Tug & Barge Company the entire custody, possession, management and control of the tug "CHARLES T", including the entire command and control over the navigation of the tug; and C. T. Smith and Esson Smith further alleged that at the time of the collision between the KARL LIEBKNECHT and the Barge EK-9 that the tug was being operated under the provisions of the alleged oral charter.

Later on the Willamette Tug & Barge Company filed its answer denying the alleged charter. Thereafter the District Court of the United States for the District of Oregon made its pre-trial order, same being filed on

June 20, 1945. (R. 36-49, inclusive). In the pre-trial order the contentions are set forth in detail, as well as the admitted facts (R. 36-49).

On December 29, 1945, (R. 50) the Honorable James Alger Fee, District Judge, rendered his opinion, and on March 11, 1946, a final decree was entered (R. 57) wherein the District Court of the United States for the District of Oregon decreed that the libelants have judgment against the Willamette Tug & Barge Company, an Oregon corporation; and furthermore, that C. T. Smith & Son have judgment against the Willamette Tug & Barge Company for the entire amount of the libelant's judgment, which C. T. Smith & Son might be required to pay.

This appeal is directed only to that portion of the final decree which holds the Willamette Tug & Barge Company to have been the charterers pro hac vice of the tug "CHARLES T" at the time of the collision, and also from that portion of the decree which renders judgment against the Willamette Tug & Barge Company for the full amount of the damage as found by the court, and in the alternative by the United States District Court for the District of Oregon failing to grant to the Willamette Tug & Barge Company a decree of dismissal and a judgment as against C. T. Smith and Esson H. Smith for costs and disbursements.

The appellant does not in this appeal desire any review of the findings of the United States District Court for the District of Oregon fixing the blame for the collision on both the tug "CHARLES T" and the steamship

KARL LIEBKNECHT; nor does this appellant in this appeal take any exception to the amount of damages awarded; and the issues in this appeal are therefore narrowed to the one proposition, to-wit:

WAS THE ORAL ARRANGEMENT BETWEEN C. T. SMITH & SON AND THE WILLAMETTE TUG & BARGE COMPANY A CHARTER PRO HAC VICE, OR WAS IT MERELY AN AGREEMENT OF TOWING OR AFFREIGHTMENT?

The testimony on the matter of the arrangement between C. T. Smith & Son and the Willamette Tug & Barge Company is very short and consists of the testimony of Charles Richard Bates, master of the tug, (R. 75), Lloyd Chappell, deckhand of the tug, (R. 82), Esson H. Smith, part owner of the tug "CHARLES T" (R. 84) and testimony of Arthur A. Riedel of the Willamette Tug & Barge Company. (R. 97-110).

A brief summary of the record as we view it would indicate that there never was any written agreement. C. T. Smith & Son claimed that they entered into a charter and that, therefore, the burden of proving the charter is upon C. T. Smith & Son. The testimony in this case indicates the following facts. C. T. Smith & Son paid the salary of the captain of the tug "CHARLES T", also the salary of the deckhand. C. T. Smith & Son paid all of the operating expenses, groceries and wages of the crew. There is not one scintilla of evidence that the Willamette Tug & Barge Company knew the salaries of the captain or the deckhand. The only thing that is definite and upon which there is no

dispute is that C. T. Smith & Son were to receive eighty per cent (80%) of all charges made for towing, and the Willamette Tug & Barge Company was to receive twenty per cent (20%). At the end of each month payment was to be made for whatever towing was done, and C. T. Smith & Son would bill the Willamette Tug & Barge Company. Pre-trial exhibit No. 14 (R. 93) indicates that the tug on some days apparently did very little work, and that apparently payments were made on each job of towing. Pre-trial exhibit No. 12, being a check of the Willamette Tug & Barge Company to C. T. Smith specifically notes that the check is in payment of "towing for the month of April, 1944, by towboat Charles T." There is no testimony that C. T. Smith & Son were to receive any stated amount per day, the only testimony being that they were to receive eighty per cent (80%) of whatever was charged for towing. There is absolutely no testimony in the record as to how long the arrangement was to exist. There is no testimony of any guaranteed return. The only testimony in which the parties agree is that C. T. Smith & Son paid all the operating expenses and costs, and it is the contention of the appellants that C. T. Smith & Son having alleged that a charter pro hac vice existed, that the burden was on C. T. Smith & Son to prove a charter, and having failed to do so, the judgment should be entered in favor of appellant.

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON BY APPELLANT

Appellant relies on Assignments of Errors Nos. 1, 2, 3, 5 and 6, and which assignments of errors relied upon are printed as an appendix to this brief. These assignments can probably be treated as one assignment of error for the reason that they are so closely related that a decision on Assignment of Error No. 3 will be reference decide the other assignments of errors. In other words, the crux of this appeal is whether or not the United States District Court for the District of Oregon erred in holding and decreeing that under all of the testimony and the exhibits that there was a charter by C. T. Smith & Son to the Willamette Tug & Barge Company, and that C. T. Smith & Son did transfer and deliver to the Willamette Tug & Barge Company the entire custody, management and control of the tug "CHARLES T", including the entire command and control of its navigation, and that the master and deckhand of the tug "CHARLES T" were at the time of the collision agents and servants of the Willamette Tug & Barge Company.

ARGUMENT

The principles of a charter and the elements necessary to constitute a charter are well known. A charter and a contract of affreightment or a naked contract or agreement of towing are two entirely different things. A charter contemplates a transfer of the entire command

and possession and consequent control over its navigation and amounts to a demise of the vessel, and the charterer will generally be considered as the owner for the voyage or service stipulated. The courts will not ordinarily regard a contract as a demise if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer. It follows accordingly that the presumption primarily is against the demise and the contract is to be construed as one for an affreightment *unless the terms show a clear intendment to the contrary*. (Italics supplied. 48 Am. Jur. 203).

A few citations from the testimony of the witnesses indicate as follows:

Mr. Riedel, who was the President and General Manager of the Willamette Tug & Barge Company, testified concerning the agreement between C. T. Smith & Son and the Willamette Tug & Barge Company as follows:

> "Q. And when did you first meet Mr. Smith, the owner——
>
> A. Well, I don't remember just exactly, but I had seen him at some meetings here about a year or so ago.
>
> Q. Well, how did it come about that he did this work for you?
>
> A. Well, here is the way I remember it, that he called me up and heard that I had more towing that I could do, and so I told him yes, and he said he would like to take some of it on, and so he wrote me a letter telling me that he would do it for 90 per cent., and I told him we had to wait so long for our money and so much trouble in the billing that I wouldn't go for ninety but for 80 per cent., give him twenty and me eighty (sic), and he take

the tows, just like anybody else, when there are any to take. He asked me if I thought that he could make six or seven hundred dollars. (235) I told him that we had a lot of towing and that if he tied up where it was handy—of course, I always get a boat—they want them at the ships, they call and want them right now, and if he was handy, why, he could do pretty well.

Q. How did it happen that he tied up at the—

A. Well, there was a few times that he tied up some place else, but I told him if he tied up there where it was handy he could get more tows, because when a tow comes in we give it to the one that is ready right now, or the next one that is handy. For instance, St. Helens, or Kensley (?), Johnny Redding, and fellows like that, they do the same thing, and when they have a tow and we have to do the billing they kick back with 10 per cent. or 20 per cent.

Q. Mr. Riedel, was there at any time anything said about charter between you and Smith relative to this?

A. No, in our conversation Smith never said a word about charter at all. I asked him about insurance and things which I ask everyone that does towing for me, and he said okeh, and I said that was good enough for me." (R. 97 & 98).

Further, concerning the matter of towing, Mr. Riedel testified as follows:

"Q. Now, did you give orders to Captain Bates?

A. Well, here is the only thing, an order would come in, if our boats wasn't there and his happened to be there, why, I would take and tell the Captain he had a barge to go so and so and it was up to him if he wanted to take it; if he didn't want to take it we would get the next handiest man, because we had to be there as soon as possible.

Q. Did your organization do any work on the Tug Charles T.?

A. No, sir, none whatever.

Q. Did you pay the employees?

A. No, sir. The only time—there was a time or two when the boys would beat it up to Stevenson to get their groceries, and there was times when they were a little short of money and they made a person-to-person loan from the bookkeeper; the bookkeeper give them a receipt and give it to them out of petty cash; and then there was times, when they would get a check, they would come in and pay it. They always paid their bills.

Q. Did you ever furnish any oil or lube?

A. No, sir, we had nothing to do with that. I didn't even know what dock they got their oil at, never noticed or paid any attention.

Q. Now, the statement of Mr. Smith to the effect that you wanted the boat kept at your moorage?

A. I didn't care if it was kept there. If it was kept there they made it a little handier for me, and I have got nine hundred foot of space there and one more boat wouldn't have made any difference.

Q. In your conversation with Mr. Smith when this towage arrangement was made was there anything said by you to Mr. Smith as to whether he could do other towing for other people?

A. No, sir, it didn't make a bit of difference to us. If he wasn't there we called Johnny Redding, Johnny White, Kensley, St. Helens, Shaver sometimes, even had Smith at Rainier,—just called on the one that was handiest to get the job done as soon as possible.

Q. Well, the question I asked you, did you have any conversation with Mr. Esson Smith to the effect that even though he was tied at your dock he could take other tows?

A. I told him if there was any tows came up it was jake with me, all I wanted to do was to get my work done, if he wasn't there I would get somebody else, because everyone on the river there works for us that is handy.

Q. And how many different ones tow for you?

A. Well, there's about six or seven or eight, and 'most all but and kicks back at 10 or 20 per cent:, because we have to do the billing and sometimes we have to wait three or four months for our money and sometimes have to borrow money to pay our bills." (R. 99 & 100).

It will be noticed from the foregoing, in answer to a question to Mr. Riedel whether Esson Smith could take other tows, that Mr. Riedel testified:

"A. I told him if there was any tows came up it was jake with me, all I wanted to do was to get my work done, if he wasn't there I would get somebody else, because everyone on the river there works for us that is handy." (R. 100).

It further appears from the foregoing testimony that no orders were given to Captain Bates; that if an order came in for a tow and none of the tugs of the Willamette Tug & Barge Company were available, that he (Riedel) would speak to Captain Bates and ask him if he wanted to make the tow.

Furthermore, Mr. Riedel on cross-examination testified as follows:

"Mr. White: Q. Did you ever put a man on the Charles T., to your knowledge?

A. Yes, sir, there was one Sunday that a fellow by the name of George McDonald that worked for Smith, and our boat had broke down, and he said, 'Art, I would sure like to make that tow. I can't get anybody.' I said, 'I haven't anything to do with the boat, but,' I said, 'being that you work for Smith, you can call him at The Dalles, and it is okeh with me,' and he called Mr. Smith at Stevenson and Mr Smith gave him permission to make

that tow and he got paid for the tow just the same as though our man wasn't on it, and it was between him and the Captain who had run that boat before." (R. 107).

It will be noticed from the foregoing that George McDonald, the man that worked for Smith, wanted to make a tow and made inquiry of Mr. Riedel for permission to use the tug "CHARLES T", and that Mr. Riedel told him to call Mr. Smith at The Dalles, and that Mr. Smith gave permission to make the tow; and Mr. McDonald was paid for making the tow. It would hardly appear from this testimony, which was not contradicted by Mr. Smith, that the whole control of the tug "CHARLES T" was turned over to the Willamette Tug & Barge Company by Smith & Son. Smith & Son even at that time exercised ownership and control of the use of the tug.

It further appears that Esson Smith testified that the agreement between himself and the Willamette Tug & Barge Company was an oral one and that it was agreed:

1. That Smith would pay all operating expenses.
2. That Smith would furnish all diesel and lube oil.
3. That Smith would furnish all groceries.
4. That Smith would pay all wages. (R. 86).

At no time in the negotiations prior to April, 1944, was anything said about repairs, upkeep, or damage that might have been caused by accident. The only testimony regarding this matter is that Mr. Riedel testified (R. 98) that Smith was asked concerning his insurance. The testimony also discloses (R. 89) that a check

written out by Willamette Tug & Barge Company to C. T. Smith & Son is in payment, "for towing". This check was cashed by Smith & Son without any protest.

Summarizing this matter, the testimony discloses in our opinion nothing more than a mere and naked contract of affreightment. It is a well settled rule of law that where a vessel is chartered, that there is an entire surrender of the vessel to the charterer, and if the object sought can be conveniently accomplished without a transfer of the vessel, the courts will not be inclined to consider the contract as a demise of the vessel.

AUTHORITIES

There is an excellent statement of the general principles concerning charter parties and contracts of affreightment in Volume 48 of American Jurisprudence commencing on page 202. It is explained that charters are of two kinds and that they differ from each other very widely in their nature as well as in their terms and legal effect. "A charter by whose terms the whole vessel is let to the charterer with a transfer to him of its entire command and possession and consequent control over its nevigation amounts to a demise of the vessel, and the charterer will generally be considered as owner for the voyage or service stipulated. . . . But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed

with the character or legal responsibility of ownership. . . . . In brief, there is a demise where the charterer is given the possession and control of the vessel, but not where he acquires merely the right to her services."

The courts will not ordinarily regard a contract as a demise if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer. "It follows accordingly that the presumption primarily is against the demise, and the contract is to be construed as one for an affreightment, *unless the terms show a clear intendment to the contrary.*" (Italics supplied.) 48 Am. Jur. 203.

It is pointed out that the terms of greatest significance in the determination as to whether a given charter amounts to a demise or is merely a contract of affreightment are those which relate to the master and crew. "If they are appointed and paid by the owner, and are subject to his orders, the charter will ordinarily be construed as an affreightment contract, on the theory that through his master and crew the owner retains possession and control of the ship, even though the directions on which the ship shall proceed are given by the charterer." 48 Am. Jur. 205.

It is to be further noted that charter parties are governed by many of the principles applicable to the formation of ordinary contracts and that mutual agreement or assent to all the terms of an alleged contract is a primary requisite. 48 Am. Jur. 205.

The Oregon cases dealing with this question have been carefully analyzed and support the Appellant's

contention that the agreement in this case was merely a contract of affreightment. In *Grimberg v. Columbia Packers Association,* 47 Or. 257, 83 P. 194, an administratrix brought an action against the association to recover for the death of her husband. The association had chartered the vessel, upon which the deceased was working as a sailor at the time of his death, from a firm in San Francisco for a voyage to Alaska and return from Astoria, Oregon. The captain of the vessel and certain members of the crew were paid by the San Francisco owners, but the husband of the administratrix had been hired by the charterer. The administratrix contended that the defendant association was owner pro hac vice of the vessel and therefore liable for the death of the deceased husband. The defendant on the other hand contended that the San Francisco owners were solely liable. The trial court granted a non-suit upon motion of the defendant and this was affirmed on appeal. The issue was squarely presented and fully discussed as to whether the charter constituted a demise or a mere contract of affreightment. It has been deemed advisable to quote at considerable length from the well considered opinion of the Honorable Chief Justice Wolverton as follows:

> "The question presented arises almost wholly upon a construction of the charter party for there are but few extraneous facts that shed any light upon the subject, which is whether the agreement constituted a demise of the vessel to the defendant or was merely a contract of affreightment, the general owners retaining the control, management and navigation thereof. It is well to observe at the outset that the presumption primarily is against a

demise, and the contract is to be construed as one for an affreightment, unless the terms show a clear intendment to the contrary. Say the learned authors of the American and English Encyclopaedia of Law (2 ed.), vol. 7, p. 167: 'The presumption is that the ownership of the vessel, even during the period covered by the charter party, continues in the general owner; and, unless the intention to transfer the possession and ownership to the charterer is unequivocally manifested by the contract, a charter party will not be treated as a lease or demise of the ship, but will be treated as a contract of affreightment.' So, in Reed v. United States, 78 U.S. (11 Wall.) 591, 601 (20 L. Ed. 220), Mr. Justice Clifford says: 'Courts of justice are not inclined to regard the contract as a demise of the ship, if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer. but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and, if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts.' The burden, therefore, lies with the plaintiff to overcome this presumption. . . .

"We should keep in mind, however, the presumption applicable, so that the doubt, if one exists, may be resolved in favor of a contract of affreightment, rather than a demise of the vessel. See further, Adams v. Homeyer, 45 Mo. 545 (100 Am. Dec. 391); and Certain Logs of Mahogany, 2 Sumn. 589 (Fed. Cas. No. 2559).

"The general rule of construction relating to the charter party is that if the vessel, the subject of the agreement, be let so that there is a transfer or relinquishment to the charterer of the entire command, possession and subsequent control, he will be treated as owner for the time being, that is, for the voyage or particular service stipulated for. How-

ever, if the charter party is but an agreement or covenant for the use of the vessel or some designated part thereof, the general owner at the same time retaining command, possession and control over its navigation, the charterer must be regarded as a contractor only for a designated or specific service, which does not alter the duties and responsibilities of the owner. In the one case the charter party operates as a lease or demise of the vessel, whereby the lessee assumes the duties and liabilities in a large measure, at least, of the owner; while in the other the agreement is for a special service to be rendered by the owner of the vessel: Reed v. United States, 78 U.S. (11 Wall.) 591, 601 (20 L. Ed. 220). 'All the cases agree,' says Mr. Justice Field, in Leary v. United States, 81 U.S. (14 Wall.) 607, 611 (20 L. Ed. 756), 'that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned.' 'But,' says Mr. Justice Story, in Marcardier v. Chesapeake Ins. Co., 12 U.S. (8 Cranch) 38, 48 (3 L. Ed. 481), 'where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership.' See, also, United States v. Shea, 152 U.S. 179 (14 Sup. Ct. 519, 38 L. Ed. 403); and Emery v. Hersey, 4 Greenleaf, 404 (16 Am. Dec. 268). So that the distinguishing feature between a demise of the ship, whereby the legal responsibilities of ownership are transferred to and assumed by the charterer, and an agreement for affreightment, is clear, and the main difficulty lies in determining what the parties intended by the charter party, considering the language in which it is clothed. . . .

"The word 'chartering' does not necessarily mean a letting of the ship by way of demise, and is equal-

ly as consistent with the idea of a contract for affreightment: Ross v. Charleston M. & S. Transp. Co., 42 S. C. 447 (20 S. E. 285).

"Following this are engagements of the first party in two clauses—the first to the effect 'that the said vessel, in and during the voyage, shall be kept tight, staunch, well fitted, tackled,' etc.; and the second that 'the whole of such vessel, excepting the private apartments of the master in the cabin,' etc., 'shall be at the sole use and disposal of the' second party during the voyage, and that no goods 'shall be laden on board otherwise than for said' second party. These contain cogent and forcible expressions indicating that an affreightment only was intended, and not a demise. They imply, first, that the owners shall have an oversight of the ship to see that it be kept in proper condition during the voyage, and, second, that they should engage in freighting the vessel, consistent with the previous clause, agreeing that no goods should be laden thereon except such as the charterer should designate. The engagements are simply what they purport to be, covenants on the parts of the owners, and are inconsistent and incompatible with the idea of a demise: Leary v. United States, 81 U.S. (14 Wall.) 607 (20 L. Ed. 756). . . . .

"By succeeding clauses it was agreed that the charterer should pay all wages of the crew, excepting the captain, all port charges and labor bills, and furnish all necessary provisions, fuel, etc., during the whole of the voyage, and should at the termination of the charter deliver the vessel in port of destination to the owner in as good condition as when chartered, reasonable deterioration for usage excepted, and that it should 'employ' the vessel only in lawful trade. These clauses certainly militate strongly against the idea of a contract of affreightment, for the charterer has taken upon himself the entire expense of the voyage, except the wages of the captain, which are provided for in the consid-

eration for the charter of the vessel. In other words, the captain's wages were included in the monthly payments to be made for the charter. Who were to furnish the crew we are not advised. By all reasonable intendment the owners were to furnish the captain or master, for why should they provide for the payment of his wages along with the consideration for the charter of the vessel? If the charterer was to provide such master, it would be a matter of indifference with the owners respecting the payment of such wages, except that they would probably have required a stipulation on the part of the charterer, as they have with reference to the wages of the crew, that such wages should be discharged, so that they would not become a lien upon the ship. From evidence aliunde we know that the decedent and others were employed by defendant to ship as sailors for the voyage. But there were mates aboard who undoubtedly participated in the navigation of the ship, and we are unadvised as to who furnished or employed them, the owners or the charterer. Their wages were to be paid by the charterer. The provisions touching the expense of the voyage are certainly largely inimical to the idea of a contract of an affreightment only: Drinkwater v. Freight and Cargo of the Brig Spartan, 1 Ware. 149, (Fed. Cas. No. 4085); First Nat. Bank of Marquette v. Stewart, 26 Mich. 84. . . . .

"The natural deduction would be that the owners retained command and possession and the consequent navigation of the vessel through the master and mates. . . . .

"These considerations, taken in connection with the legal presumption that obtains in favor of the continuance of ownership of the ship in the general owners, and against any transfer thereof for the voyage, impel us to the conclusion that the contract is one of affreightment only, and does not constitute a demise. The presumption alluded to is said to be so strong that, if the end sought to be affected by

> the charter party can conveniently be accomplished without a transfer of the vessel to the charterers, the law is not disposed to regard the contract as a demise; and this, even if there be express words of grant in the formal parts of the instrument: Hagar v. Clark, 78 N.Y. 45. No such words whatever are found in the present charter party." (The foregoing excerpts are from 47 Or. 257; 83 P. 194.)

In *Multnomah County v. Willamette Towing Company,* 49 Or. 204, 89 P. 389, the County brought an action to recover for damages caused by the steamship, Almond Branch, fouling the Morrison Street Bridge in Portland, Oregon. The vessel was owned by an English concern and was under charter to the Pacific Export Lumber Company. The vessel had taken a part of a cargo of lumber, and the captain was directed by the charterer to proceed to the lumber company's dock to receive the remainder of its cargo. The lumber company obtained a tug to assist in the steering of the vessel while proceeding to its dock, and the vessel fouled the bridge while the tug was so engaged. The lumber company interposed the defense that it did not control the vessel and was a mere charterer. A judgment was entered by the defendant lumber company which was affirmed on appeal. The court, on page 215, stated as follows:

> "There was no evidence, so far as we can ascertain, connecting the lumber company with any of the negligent acts charged. It was the charterer or hirer of the Almond Branch, but did not have command, possession or control of the vessel, so far as its management or navigation were concerned, except to direct where it should receive its cargo. The vessel was under the sole charge and command of

the master employed by and who represented the owners, and not the charterers. By the terms of the charter party, the owners agreed to let, and the lumber company to hire, the vessel 'with a full complement of officers, seamen, engineers and firemen, and in every way fitted for the service to trade' between such ports as the charterer might direct for a period of from three to nine calendar months at the charterer's option; the cargo to be taken or discharged at any dock or wharf the charterer might direct where the vessel could lie safely afloat. The owners agreed to provide and pay for all provisions, the wages of the captain, officers and crew, insurance, engine room stores, and to maintain the vessel in a thoroughly effective state in hull and machinery for service, and that the captain employed by the owner should be under the orders and direction of the charterers as regarded agency and other arrangements, and should prosecute his voyages with the utmost dispatch. The charterer was to provide and pay for fuel, port charges, expenses of loading, and the like, and 10 shillings per gross ton register per calendar month. Such a charter party is a mere contract of affreightment, and not a demise of the vessel, and the charterer is not liable for the acts and conduct of the officers and crew in the management of the vessel: Grimberg v. Columbia Packers' Assoc., 47 Or. 257 (83 Pac. 194; 114 Am. St. Rep. 927)."

In *Adams v. Carey,* 60 Or. 153, 118 P. 553, the plaintiffs, owners of a tug, had chartered it to the defendants for an agreed rate. During the period of the charter the tug was involved in a collision with another vessel, and the defendants settled with the owners of the other vessel for damages suffered by the latter. The defendants sought to set off the amount paid in damages against the amount due under the charter contending that the

charter was a mere contract of affreightment. The plaintiffs contended that the charter constituted a demise of the vessel and that the defendants were owners pro hac vice. The court stated as follows:

> "There is nothing peculiar or technical in the construction of this kind of contracts. As in all other agreements, the intention of the parties is the point to be aimed at. This should be determined from the whole instrument. Primarily the presumption is against a demise, and that the ownership of the vessel during the period of the charter party continues in the general owner; and, unless the intention to transfer the possession and ownership to the charter is unequivocally manifested by the contract, the charter party will not be treated as a lease or demise of the ship, but will be treated as a contract of affreightment. Grimberg v. Columbia Packers' Association, 47 Or. 257 (83 Pac. 194; 114 Am. St. Rep. 927), 7 Am. Eng. Enc. of Law (2 ed.) 167. . . . .
>
> "It was stipulated in this clause that the vessel was to perform such duties in accordance with the terms of the agreement as might be required of her by the charterer. In effect, it was covenanted that the defendant should direct where the vessel was to go, and what she was to do; but it does not appear that the defendant was authorized to direct how the service should be performed, or how the tug should be managed, the details of navigation being left to the owner, who retained command and possession of the vessel through the captain and crew.
>
> "Clause 6 provided that all expenses of fuel, supplies, wages of the crew, and other expenses were to be borne by the plaintiffs, who were to keep the vessel fully furnished and in good condition to perform the required duties. They were at perfect liberty to employ thoroughly skilled and competent navigators for the tug at a fair compensation; or,

if they saw fit to take such a chance, they might employ less skilled and competent officers and crew, for smaller wages, to navigate the tug. From the evidence in the case, it also appears that the tug Sampson was under the direct control and management of the captain, who from the terms of the agreement, as well as from the evidence in the case, we think was the agent of the owners, and responsible to them, and that the charter party in question did not effect a demise of the tug, but was a mere contract of affreightment. Grimberg v. Columbia Packers' Association, 47 Or. 257 (83 Pac. 194; 114 Am. St. Rep. 927); Multnomah County v. Willamette Towing Company, 49 Or. 204 (89 Pac. 389); The Santona (C.C.) 52 Fed. 516; Marcardier v. Chesapeake Insurance Company, 12 U.S. (8 Cranch) 39 (3 L. Ed. 481); Adams v. Homeyer, 45 Mo. 545 (100 Am. Dec. 391); Ross v. Charleston M. & S. Trans. Co., 42 S.C. 447 (20 S.E. 285)."

In *Daniff v. Charles R. McCormack and Co.*, 105 Or. 697, 210 P. 703, the court stated:

"Ownership and possession of the vessel, with the liabilities incident thereto, are presumed to remain in the owner, unless a contrary intention is unequivocally manifested by the contract: Adams v. Carey, 60 Or. 153, 159 (118 Pac. 553).

"In order then to complete her proof, plaintiff was obliged to show that the charter party or contract, if one existed between defendant and the owner of the vessel, contained unequivocal terms which imposed upon defendant the rights and liabilities of an owner of the vessel for the voyage that was in progress at the time plaintiff was injured. Plaintiff made no attempt to supply this proof.

. . . . .

"If, however, it may be said that plaintiff was not bound to furnish evidence of the terms of the charter-party or contract between the owner and

defendant, the case of plaintiff is still defective, for the reason that primarily the presumption attaches to all such contracts that the contract if one of affreightment, in which the general owners retain the control, management and navigation of the ship and the legal responsibility of ownership: Grimberg v. Columbia Packers' Assn., 47 Or. 257, 262 (83 Pac. 194, 114 Am. St. Rep. 927, 8 Ann. Cas. 491); Multnomah Co. v. Willamette Towing Co., 49 Or. 204, 215 (89 Pac. 389); Adams v. Carey, 60 Or. 153, 159 (118 Pac. 553). . . . .

"Counsel for plaintiff says that the exercise by defendant of authority to direct where cargo was to be taken and discharged constituted evidence that defendant controlled and operated the vessel.

"A provision in a charter-party that the master of the vessel employed by the owner shall be under the directions of the charterer, who may direct where cargo shall be taken and discharged, does not make the charterer liable for the negligence of the officers and crew in the management of the vessel: Multnomah Co. v. Willamette Towing Co., 49 Or. 204, 215 (89 Pac. 389)."

In *Miami Quarry Company v. Seaborg Packing Company,* 103 Or. 362, 204 P. 492, the court stated on page 374:

"The operator of a tug engaged in a towing contract is ordinarily held to be an independent contractor: Woodard v. A. F. Coats Lumber Co., 97 Or. 302 (191 Pac. 668). . . . ."

It is well settled that where a contract or charter does not amount to a demise the navigation of a vessel is the sole responsibility of the owner. *The West Eldara,* 101 F. (2d) 45, 104 F. (2d) 670.

In *The Capitaine Faure,* 10 F. (2d) 950, the owners under the charter provided the captain and the crew. The court stated at page 962:

> "It is certain that the charter party was not a demise. The captain, officers, and crew were not appointed by the charterers but named by the owners, and through them the owners were in possession of the vessel and responsible for her navigation."

In *The Terne,* 64 F. (2d) 502, the court held that the contract did not amount to a demise and stated:

> "The captain managed the ship for the owner and though he was the agent of the charterer for some purposes, he was not in respect to the navigation of the vessel."

Justice Holmes in the leading case of *New Orleans—Belize Steamship Company v. United States,* 239 U.S. 202, at page 205 stated:

> "The main contest is upon the question whether by this contract the United States became owner pro hac vice as affecting the extent of the liability assumed. . . . The general owner furnished the crew and a master who at least regarded himself as representing its interests since he protested against commands that he received. . . . We deem it plain that the control and navigation of the vessel remained with the general owner although the directions in which it should proceed were determined by the United States. *Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person.* . . . We conclude that the possession followed the navigation and control." (Italics supplied).

The federal courts also hold that there is a presumption against a demise. In *Pacific Improvement Com-*

pany v. Schubach-Hamilton Steamship Company, 214 F. 854, the court stated at pages 859 and 860:

> "The presumption is that the contract was one of affreightment, merely, and the contrary must clearly be made to appear before it will be held to constitute a demise. . . . That the contract was one of affreightment only is further shown by other provisions of the charter party. It provides that the owner shall pay the officers and crew. This, while not absolutely controlling, is persuasive."

Again in *Davison Chemical Corporation v. The Henry W. Card et al,* 144 F. (2d) 705 at 706, the court stated:

> " . . . Under the charter provisions the owner paid the master and crew and retained control over the navigation of the tug. This was sufficient to prevent the contract from falling within those charters which have been interpreted as placing the master and crew and the navigation of the vessel under the control of the charterer. We think the charter plainly did not amount to a demise."

In *The Beaver,* 219 F. 139, the court held that there could be no demise if the owner retains control of the navigation and stated at page 142:

> "The charterer in the present case, having nothing whatever to do with the navigation of the Selja, upon the most obvious principles of justice cannot be held in any way responsible for the negligence of her master, who in the matter of her navigation, was the agent of the owner and not the agent of the charterer."

To the same effect see *Leary v. United States,* 81 U.S. 607, where the court stated at page 611:

> "All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the owner of such command, possession and control is incompatible with the existence at the same time of such special ownership in the charterer."

In *Reed v. United States,* 78 U.S. 591, 601, the court stated:

> "Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer."

The case of *Gormley v. Thompson—Lockhart Company,* 234 F. 478, is quite analogous to the case at bar. The owner furnished the captain and crew of the vessel while the charterer gave orders as to its destination. The vessel negligently became involved in a collision which damaged its tow. The charterer had the tow repaired and sought to set off the amount so paid against the amount due under the charter. The court allowed the set-off and stated:

> "The master and crew being employed by the libelant were his agents, and he is responsible for their acts within the scope of their employment."

In *Watts v. Camorse,* 10 F. 145, it is stated that federal courts may consider a charter party in the light of the law in the state where the contract was executed.

It is stated in 58 C.J. 156, that there is a presumption against ownership pro hac vice. At page 162 it is

stated that "a provision for compensation based upon a proportionate share of the net earnings is consistent with a contract of affreightment merely.'

The following cases hold that there is no liability on the charterer if the owner retains control:

Marcadier v. Chesapeake Insurance Co., 12 U.S. 39.
Luchenbach v. McCahan Sugar Co., 248 U.S. 139.
The Nicaragua, 72 F. 207.
The Norland, 101 F. 967.
The Charlotte, 285 F. 84.
Sturgis v. Boyer et al., 65 U.S. 110.
The Leader, 166 F. 139.
The Steel Inventor, 35 F. Supp. 986.
The Volund, 181 F. 643.
Luchenbach v. Insulor Line, 186 F. 327.

In *Pacific Improvement Co. v. Schubach-Hamilton S. S. Co.,* 214 F. 854 at page 859, the court held that there is a presumption that the contract is one of affreightment only, and the contrary must clearly be made to appear before it will be held to constitute a demise. In this case the agreement provided that the owner should pay the officers and crew. The court held that while this was not absolutely controlling, yet it was persuasive.

In the case of *Barbaro v. Auditore Contracting Co. Inc. et al,* 214 N.Y.S. 221, the court held that where there is a doubt as to whether there is a demise or a contract of affreightment that same must be resolved in favor of the latter. The reason for this rule being that there must be clear and convincing proof in order to transfer burdens and liabilities which are attached to the ownership and control of a vessel.

The appellee, C. T. Smith & Son, will undoubtedly cite the case of *Frederick J. Middlebrook,* 67 Ct. of Claims 294, as supporting their contention that there was a charter pro hac vice. However, this case can readily be distinguished from the case at bar. Frederick J. Middlebrook was a vessel chartered to the United States Government during World War I and was, in fact, virtually a part of the United States Navy and under the direction of Naval officers, which readily excludes it from bearing directly on the case at bar. The court made special findings of fact, some of which are as follows:

1. The owners contracted with and chartered as owner thereof to the United States of America the steamship under consideration and delivered it to the United States under said charter.

2. Under express charter provisions the charterers were to pay for coal and fuel and all port charges, and the vessel was to be employed by the United States "on such duty as may be directed by naval authorities."

3. The charter contract provided "the captain shall be under orders and directions of charterers as regards employment, agency, and other arrangements."

4. The vessel was to be docked wherever the charterers directed and at their disposal.

5. The vessel was at all times subject to the orders and directions of government officers and at no time did the owners interfere with or direct the operations of the vessel. " . . . and the said steamship became an essential part of the line and service of supplies for the

war fleet. Such supplies included ammunition, oil, gas, and everything necessary for the fleet in time of war."

The vessel was destroyed through the negligence of government officers in directing that inflammable materials be carried in a part of the vessel near the boilers. Further factors are that the court found that control of navigation was exercised by the charterers and that the naval supply officer had written a letter to the owners as follows: "It is requested that the captains of any vessels now under charter to the navy department be directed to carry out orders immediately, unhesitatingly, and without question."

The court construed the charter provision that the vessel should be placed at the disposal of the government as meaning that the owners had lost all control of it.

From the foregoing it clearly appears that the government had taken complete control of the vessel and that it "was being operated under war time conditions and as a part of a combatant fleet." The owners retained absolutely no control over the vessel in any respect, and for all practical purposes the captain was bound to obey all orders of the navy department.

Appellee will probably also cite the case of *Hahlo et al v. Benedict,* 216 F. 303; however, in this case there was a written charter contract which provided, "The captain shall pay the charterer the same attention as if he were the owner. . . ." This provision formed a basis for the decision and clearly differentiates it from the case at bar.

Appellee will also undoubtedly cite the case of *The Charlotte,* 285 F. 84; however, in this case there was a written contract containing the words "did charter and lease" to the State of New York a certain vessel. The court found "that her captain was under the direction and control of the superintendent of public works even though appointed by the owners, is clearly shown, not only by the charter party but by the proofs." It appears that charters to state and federal governments vest a greater degree of control in the government than would be the case in a charter to a private individual.

Also, in *The India,* 16 F. 262, which will undoubtedly be cited by appellee, the master of the vessel by the express terms of the charter party was under the orders and directions of the charterers.

Also, in *The City of Everett,* 107 F. 964, which will undoubtedly be cited by appellee, the vessel was placed at the disposal of the charterers. The charterers provided and paid the captain and crew. The charterers paid the fuel and supplies. The charterers agreed to paint the vessel if the charter lasted over a year, and the charter provided that the captain should be under the orders and directions of the charterers.

It is the contention of the appellant:

1. In order to constitute a charter pro hac vice the charterer must be given the complete possession and control of the vessel and not merely the right to her services.

2. The Claimants must overcome the presumption against a demise and in favor of a contract of affreightment by clear and convincing evidence.

3. If the catpain and crew are appointed by and paid by the owner that factor would be of great significance in reaching the conclusion that the agreement was a contract of affreightment and not a charter pro hac vice.

4. The Oregon law is well settled on the proposition that a contract is to be construed as one for an affreightment only and that the factor that the captain and crew are furnished by and paid by the owners strongly suggests an affreightment.

5. The fact that the owners pay all expenses of the vessel including fuel and supplies and general maintenance also points to a contract of affreightment and nullifies the contention that it was a charter pro hac vice.

6. The fact that the charterers direct where the vessel shall proceed does not mean that the charter is pro hac vice.

7. The authority to direct the course of the captain and crew does not prevent the captain and crew from remaining the servants of the owner.

8. There can be no charter pro hac vice if the owner retains control of the navigation.

9. Courts are not inclined to regard a contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer.

10. Federal courts may consider a charter party in the light of the law in the state where the contract was

executed.

11. That compensation for the use of the vessel is based upon a proportionate share of the net earnings is persuasive in leading to the conclusion that the contract was one of affreightment.

The testimony in this case discloses that the compensation was to be eighty per cent (80%) of the earnings of the vessel. Such an arrangement is certainly more in keeping with the mere independent contract than with a charter pro hac vice. The owners through the captain were not required to take any tows, but could take them or not, as they desired. It is clear that the claimants were in the same position as four or five other tug owners, who also took tows for the appellants under the same conditions. The fact that the claimants were not obligated to take any tows at all clearly negatives any exercise of control over the vessel by appellant. On the other hand, supposing that the Willamette Tug & Barge Company did not at any time offer any tows to C. T. Smith & Son, the appellee. What would be the remedy of C. T. Smith & Son under such circumstances? Another thing to be considered is what is the length of the charter, if there was a charter? It must be remembered that the appellee in this case contends that prior to April, 1944, Willamette Tug & Barge Company chartered the "CHARLES T". It is one thing to say there was a charter. This, however, is merely a conclusion on the part of the appellee. Under all of the evidence of the facts in this case, did the appellant have the right to say that the tug "CHARLES T" was to stay in Port-

land as long as the appellant desired it to stay? Could the appellant have kept the tug in Portland without any remuneration? Did the appellant have the right to discharge the captain or the deckhand? There is nothing in the evidence to indicate that the vessel should be available at any particular time or at all. There is nothing in the evidence to show that the appellant exercised any supervision over the captain and the only evidence is that the captain of the tug was informed that a tow was available if he wanted it, and if so, where to proceed. The captain admitted that he was in full custody of the boat and that he received no orders from the appellant as to how it should be navigated. It is difficult to see how the appellee can contend that the alleged oral agreement can be construed as a charter pro hac vice. About the only thing that is certain in the case is that the appellee was to receive eighty per cent (80%) of all charges made for towing, and the appellant twenty per cent (20%).

In the opinion of the District Judge, James Alger Fee, stress was laid upon the fact that the owners of the tug were not licensed by the Interstate Commerce Commission to operate below Longview, while the Willamette Tug & Barge Company was so licensed. The court below stated that the Willamette Tug & Barge Company could operate below Longview with its own boats or those under demise. Section 903(f) 49 U.S.C.A. provides in part as follows:

> "Notwithstanding any provision of this section or of section 902 the provisions of this chapter shall not apply—

"(1) * * * *

"(2) *to transportation by water by any person (whether as agent or under a contractual arrangement for* a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to chapter 8 of this title, or *a water carrier subject to this chapter,* in the performance within terminal areas of transfer, collection, or delivery services, or *in the performance of* floatage, car ferry, lighterage, or *towage; but such transportation shall be considered to be performed by such carrier* or express company *as part of, and shall be regulated in the same manner as, the transportation by* railroad, express, motor vehicles, or *water to which such services are incidental.*" (Italics supplied).

Thus it would appear that the tug could lawfully operate below Longview, without being under demise, so long as it was "under a contractual arrangement" with the Willamette Tug & Barge Co. for which it was engaged in towage. In the case of *De Bardelegen Coal Corporation v. U. S.,* 54 F. Supp. 643, the Court interpreted the section above quoted as meaning that a tower needs no certificate of public convenience and necessity to the extent that towage is performed for another water carrier, and that the exemption was not limited to towage within terminal areas. If the tug could lawfully operate below Longview under the terms of the statutory exemption, by merely being under contract to the Willamette Tug & Barge Company, no presumption of a demise would arise by reason of the fact that it did operate below Longview.

Even if the exemption noted above were held inapplicable, the record discloses that the Willamette Tug

& Barge Company did not know of the limitations on the operation of the tug below Longview, and that the limitations were not disclosed by the owners, nor were they in fact discussed at all by the parties when the contract was negotiated. It is fundamental that a contract of this type is to be construed in accordance with the intentions of the parties, and upon the basis of their discussions at the time of negotiations.

CONCLUSION

Appellant contends that the court erred in entering its decree against the Willamette Tug & Barge Company as set forth in the assignment of errors which are printed in the Appendix, and in not entering a decre of dismissal herein as to the appellant, and in not entering a judgment as against C. T. Smith and Esson H. Smith for its costs and disbursements.

Respectfully submitted,

SENN & RECKEN,
L. A. RECKEN,

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910 Public Service Building,
Portland, Oregon.

APPENDIX

ASSIGNMENT OF ERRORS

The Willamette Tug and Barge Company, appellant, hereby assigns errors in the proceedings, decisions and decree of the United States District Court for the District of Oregon as follows:

1. In holding that the libelants shall recover from the appellant, Willamette Tug and Barge Company, an Oregon corporation, the full sum of $11,115.10 with interest thereon at 6% from and after July 28, 1944.

2. In holding that C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, shall have and recover of and from Willamette Tug and Barge Company the entire amount of the libelants' judgment which C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, may be required to pay.

3. In finding that at and before the time and place of the collision between the "Karl Liebknecht" and the barge "EK-9" being towed by the tug "Charles T", that the said C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, (105) did charter, transfer and deliver to the Willamette Tug and Barge Company the entire custody, management and control of the tug "Charles T", including the entire command and control of its navigation; and in holding that the Willamette Tug and Barge Company was the charterer of the Tug "Charles T" and that the master and deckhand of the said tug "Charles T", to-wit: Charles Bates

and Lloyd Chappell, respectively, were at the time of the collision servants and agents of the Willamette Tug and Barge Company, a corporation; and in holding that the Willamette Tug and Barge Company is and was a charterer pro hac vice of the tug "Charles T", and that said Willamette Tug and Barge Company was and is responsible for the faults of the navigators of the tug "Charles T".

4. Appellant waives original Assignment of Error No. 4.

5. In failing to hold that under all of the facts and evidence in this case, the Willamette Tug and Barge Company, a corporation, and the said C. T. Smith and Esson H. Smith were engaged in nothing more than a contract of affreightment, and that the said C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, retained full control, supervision and management of the Tug "Charles T".

6. In failing to decree that the Willamette Tug and Barge Company, a corporation, was entitled to a decree of dismissal herein and a judgment as against the said C. T. Smith and Esson H. Smith for its costs and disbursements.